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Note by the Coordinator

Attached is the outcome of an inter-sessional meeting held in Siracusa, from 31 January to 6 February 2000.

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Informal inter-sessional meeting of the Preparatory Commission for the International Criminal Court, on Elements of Crimes, held in Siracusa, Italy, from 31 January to 6 February 2000

Contents

		Paragraphs	*Pa*
A.	Introduction	1–5	
B.	Summary of proceedings	6–15	
1.	Elements of Crimes and mistake of fact or mistake of law addressed in article 32	6	
2.	Elements of Crimes and those elements involving value judgement	7	
3.	Elements of Crimes and other forms of criminal responsibility	8	
4.	Elements of Crimes and the question of overlap of crimes	9	
5.	General introduction to the Elements of Crimes and the relationship between article 30, "Mental element", and the elements of crimes for articles 6, 7 and 8	10–13	
6.	Structure of the Elements of Crimes and contextual elements	14–15	

A. Introduction

1. At the invitation of the Government of Italy and the International Institute of Higher Studies in Criminal Sciences, an inter-sessional meeting of the Preparatory Commission for the International Criminal Court was held in Siracusa, Italy, from 31 January to 6 February 2000 to address some pending issues before the Preparatory Commission in the context of the Elements of Crimes which were to be taken up by the Working Group on Elements of Crimes at its March session.

2. The inter-sessional meeting held a general discussion on the following issues: Elements of Crimes and mistake of fact or mistake of law addressed in article 32; Elements of Crimes and those elements involving value judgement; Elements of Crimes and other forms of criminal responsibility; Elements of Crimes and the question of overlap of crimes; general introduction to the Elements of Crimes and the relationship between article 30, "Mental element", and the elements of crimes for articles 6, 7 and 8; and the structure of the Elements of Crimes and contextual elements.

3. These issues involved complex legal and policy questions. They needed to be addressed thoroughly taking into account the Statute and the approach taken by domestic legal systems. The inter-sessional meeting in Siracusa was most helpful in providing such an opportunity. The meeting was also timely. The Working Group on the Elements of Crimes would have to address those issues at its March session.

4. The participants of the inter-sessional meeting expressed their appreciation to the Government of Italy and the International Institute of Higher Studies in Criminal Sciences for providing an opportunity for an informal exchange of views and dialogue among the participants on such important issues, and for their generous hospitality.

5. The present document does not necessarily represent the views of the Governments of the participants, nor does it represent an agreed text or conclusions among the participants. It contains work in progress that would have to be reviewed and reassessed in the light of further work on the Elements of Crimes. It is hoped that the material in the present document would facilitate the work of the Working Group on the Elements of Crimes.

B. Summary of proceedings

1. Elements of Crimes and mistake of fact or mistake of law addressed in article 32

6. The participants considered the issues of "mistake of fact" and "mistake of law", and in particular the distinction between "ignorance of the law" (as to whether particular conduct constitutes a crime within the Statute) and mistake of law negating a mental element. There was a general view that these matters did not require further elaboration in the Elements of Crimes since article 32 provides sufficient guidance on these issues.

2. Elements of Crimes and those elements involving value judgement

7. There was a discussion on elements involving some form of value judgement, such as the terms "inhumane" or "severe". The issue was whether a statement was required in the Elements of Crimes clarifying that the Prosecutor is not obliged to prove that the accused personally completed the correct normative evaluation, i.e. that the accused considered his acts "inhumane" or "severe". There was a general view that this proposition was sufficiently evident and that further elaboration in the Elements of Crimes was not required.

3. Elements of Crimes and other forms of criminal responsibility

8. There was a discussion on whether to elaborate further on such issues as aiding, abetting, inciting, etc., or on command responsibility. The general view was that articles 25 and 28 were sufficient and that no additional elements addressing those forms of criminal responsibility were required.

4. Elements of Crimes and the question of overlap of crimes

9. The question of overlap of crimes (*concours d'infractions*) was considered. Some participants were of the view that this issue would be difficult to resolve, and in any event should not be addressed in the Elements of Crimes. Some other participants felt that the issue was one of serious concern on which they would reflect further, and noted that they might introduce a proposal on the subject in the future for inclusion in the Rules of Procedure and Evidence.

5. General introduction to the Elements of Crimes and the relationship between article 30, "Mental element", and the elements of crimes for articles 6, 7 and 8

10. The question of a general introduction to the Elements of Crimes and the relationship between article 30, "Mental element", and the elements of crimes for articles 6, 7 and 8 was discussed.

11. The text set out below is intended to serve as a general introduction to the Elements of Crimes. It is intended to present certain assumptions on which the Elements of Crimes are drafted and to provide reading directions. In particular, it is intended to explain why, normally, no mention is made in the numbered elements of the various crimes of the accompanying mental element. It also explains that issues concerning grounds for excluding criminal responsibility and requirements of "unlawfulness" are generally not addressed in the Elements of Crimes.

12. The text would replace the one that emerged, after the first reading, as a general paragraph to war crimes and the first of the general paragraphs in the introduction to crimes against humanity. It is drafted in a way which makes it applicable to genocide as well. It would be placed either in a "super *chapeau*" or in a general introduction to the whole Elements of Crimes, or as the opening statement to the *chapeau* for each of the crimes. In the latter case, the text would be followed by whatever additional paragraphs were specific to that type of crime and common to the crimes of that type.

13. The text set out below does not and cannot at this stage represent general agreement on its formulation. The text must be evaluated against a satisfactory solution to the second reading of the numbered elements of each crime and any general elements common to a specific type of crime. The text of the general introduction/*chapeau* will have to be revisited towards the end of the second reading of Elements of Crimes. Until then, it is suggested to serve as a provisional point of reference for the second reading.

Chapeau/General introduction

Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21, and the general principles set out in Part 3 are applicable to the Elements of Crimes.

As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

The Elements of Crimes generally do not address grounds for excluding criminal responsibility.

The requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not addressed in the Elements of Crimes.

(If a decision is taken to use short titles for the crimes, there should be a sentence in the *chapeau* explaining that the short titles have no legal effect.)

6. Structure of the Elements of Crimes and contextual elements

14. The issues of the structure of the Elements of Crimes and the contextual elements were also discussed.

15. A recommendation regarding structure flows naturally from the *chapeau*. Since the Elements of Crimes focus on the conduct, consequences and circumstances associated with each offence, they can be listed, as a general rule, in that order. When required, a particular mental element will be listed after the related conduct, consequence or circumstance. Contextual circumstances would be listed last. For genocide and crimes against humanity, a particular mental element will be listed. For war crimes, no mental element as to the context will be listed. The

issue is left open. A statement should be added to the *chapeau* for war crimes as follows:

> "It is understood that the elements for war crimes do not include any requirement that the accused make any legal evaluation as to the existence of an armed conflict or its classification as international or non-international."